

EXHIBIT A

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CHASE BANK USA, N.A.,
erroneously sued as CHASE
MANHATTAN BANK U.S.A.,
N.A., and JPMORGAN CHASE & CO.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

DAVID J. LEE and DANIEL R.
LLOYD, as individuals and, on behalf of
others similarly situated,

Plaintiffs,

vs.

CHASE MANHATTAN BANK U.S.A.,
N.A., a Delaware corporation, CHASE
MANHATTAN BANK U.S.A., N.A.
d.b.a. CHASE BANK U.S.A., N.A.,
JPMORGAN CHASE & CO., a
Delaware corporation; and DOES 1
through 100, inclusive,

Defendants.

Case No. CV-07-4732 MJJ

THE HON. MARTIN J. JENKINS

**DEFENDANTS' STATEMENT OF
RECENT DECISION IN SUPPORT
OF MOTION TO DISMISS**

Pursuant to Civil Local Rule 7-3(d), Defendants Chase Bank USA, N.A., erroneously sued as Chase Manhattan Bank U.S.A., N.A. and JPMorgan Chase & Co., hereby advise the Court of the recent order dated March 4, 2008 in David J. Lee et al. v. Capital One Bank, Case No. CV-07-4599 (MHP) (N.D. Cal. Mar. 4, 2008), attached hereto as Exhibit 1, which was not available at the time Defendants' Motion to Dismiss was heard on January 29, 2008. The Capital One decision is relevant as it bears upon issues in the pending Motion to Dismiss.

Dated: March 5, 2008

Respectfully submitted,

STROOCK & STROOCK & LAVAN LLP
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By: /s/ Stephen J. Newman
Stephen J. Newman

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EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID J. LEE, an individual and, on behalf of
others similarly situated,

Plaintiff,

No. C 07-4599 MHP

v.

MEMORANDUM & ORDER

CAPITAL ONE BANK and CAPITAL ONE
SERVICES, INC., Virginia corporations, DOES
1 through 100, inclusive,

Re: Defendants' Motion to Dismiss

Defendants.

Named plaintiff David J. Lee ("Lee") brings this class action against defendants Capital One Bank, Inc. ("Capital One Bank") and Capital One Services, Inc. ("Capital One Services") for violations of California consumer protection statutes and fraudulent inducement. Plaintiff alleges that defendants' credit card-member agreements contain unconscionable provisions in violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17209, and the California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750-1780, and that defendants fraudulently induced plaintiff to enter into a card-member agreement. Defendants now move to dismiss plaintiff's complaint for, among other reasons, lack of Article III standing. Having considered the arguments and submissions of the parties, and for the reasons stated below, the court enters the following memorandum and order.

1 BACKGROUND

2 In March 2007, plaintiff obtained a Capital One “No Hassle Miles Visa Signature” credit
3 card. Complaint ¶ 20. To obtain the card, plaintiff signed a card-member agreement (“Agreement”)
4 and paid a \$39.00 annual fee. Id., ¶ 20. Within approximately three weeks of obtaining the card,
5 plaintiff sent a letter to Capital One Bank alleging that the arbitration provision in the Agreement
6 contained unconscionable terms and demanding that Capital One Bank remove or revise it. Pls.’
7 Exh. 10. Capital One Services responded with a letter informing plaintiff that it disagreed with his
8 position and would not remove or revise the arbitration provision. Id., Exh. 11. On September 5,
9 2007, plaintiff filed this action. Represented by the same attorney, plaintiff subsequently filed
10 materially identical actions against two other credit card companies, American Express Travel
11 Related Services and Chase Manhattan Bank USA, N.A. Plaintiff’s suit against American Express
12 was dismissed without leave to amend. Lee v. American Express Travel Related Services, Inc., No.
13 C 07-4765, 2007 U.S. Dist. WL 4287557, at *1-2 (N.D. Cal. Dec. 6, 2007) (Breyer, J.). Plaintiff’s
14 suit against Chase Manhattan Bank is pending. Lee v. Chase Manhattan Bank USA, N.A., et al., No.
15 C 07-4732 (N.D. Cal. September 14, 2007) (Jenkins, J.).

19 The heart of plaintiff’s complaint is that the Agreement contains an unconscionable
20 arbitration provision in violation of his rights under the UCL and the CLRA. Plaintiff alleges that
21 the arbitration provision is unconscionable because it contains, *inter alia*, a class action waiver and
22 an injunctive relief waiver. Complaint ¶ 3. Plaintiff also alleges that other provisions are
23 unconscionable, including a choice of law provision and a provision that gives defendants the right
24 to amend the Agreement. Id. According to plaintiff, the inclusion of these provisions violates the
25 CLRA, which plaintiff contends makes it unlawful to include an unconscionable provision in a
26 contract, and violates the UCL because the provisions are “unlawful and unfair.” Id., ¶ 4. Plaintiff
27 argues that because the arbitration provision and other challenged provisions are unlawful, he did
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1 not receive the “full value” of his contract, which amounts to a “loss of money.” Id. This loss of
2 money, plaintiff argues, entitles him under the UCL and the CLRA to restitutionary and injunctive
3 relief. Id. Plaintiff also seeks a declaratory judgment, punitive damages, and attorneys’ fees for his
4 statutory claims. Id.

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6 In addition to his statutory claims, plaintiff alleges that defendants fraudulently induced him
7 to enter into the Agreement by representing that it was legal and conscionable. Id., ¶ 5. For his
8 fraud claim, plaintiff seeks rescission of his contract and restitution of fees paid. Id.

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10 Defendants now move to dismiss plaintiff’s complaint under Federal Rule of Civil Procedure
11 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, under Federal Rule of Civil
12 Procedure 12(c) for judgment on the pleadings. In their motion to dismiss, defendants argue that
13 plaintiff has not satisfied the injury in fact requirement for Article III standing. In their motion for
14 judgment on the pleadings, defendants argue that plaintiff’s statutory claims fail as a matter of law
15 and that plaintiff’s fraud claim fails to state a legal claim. Defendants also contend that plaintiff’s
16 complaint is barred by collateral estoppel. Because the court finds that plaintiff has failed to satisfy
17 the injury in fact requirement, the following discussion is confined to Article III standing, and the
18 court does not reach defendants’ alternative arguments for dismissal.

19 20 21 LEGAL STANDARD

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23 Under Article III of the Constitution, federal judicial power extends only to “Cases” and
24 “Controversies.” U.S. Const., art. III, § 2, cl. 1. Article III standing is thus a threshold requirement
25 for federal court jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). At a
26 constitutional minimum, standing requires the party invoking federal jurisdiction to show that it has
27 “suffered some actual or threatened injury as a result of the putatively illegal conduct of the
28 defendant, and that the injury can be traced to the challenged action and is likely to be redressed by a

1 favorable decision.” Valley Forge Christian College v. Americans United for Separation of Church
2 and State, Inc., 454 U.S. 464, 472 (1982) (citations and internal quotations omitted). To satisfy the
3 injury in fact requirement, the alleged harm must be “an invasion of a legally protected interest
4 which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”
5 Lujan, 504 U.S. at 560 (citations and internal quotations omitted). On a motion to dismiss, “general
6 factual allegations of injury resulting from the defendant’s conduct may suffice.” Id.
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9 DISCUSSION

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11 Defendants argue that plaintiff’s alleged injury is merely conjectural because the challenged
12 provisions have not caused plaintiff actual harm. Defendants note that plaintiff has not attempted to
13 arbitrate or been forced to arbitrate any of his claims. They also dispute plaintiff’s allegation that he
14 did not receive the “full value” of his contract, arguing that plaintiff received exactly what
15 defendants promised him. As support for their argument, defendants cite American Express, 2007
16 U.S. Dist. WL 4287557, at *2-6, where a materially identical action against American Express
17 Travel Related Services was dismissed for lack of Article III standing. The plaintiffs in American
18 Express, one of whom is plaintiff in this action, argued that they suffered injury as a result of not
19 being able to arbitrate a fraudulent inducement claim against American Express. Id. According to
20 the plaintiffs, they could not arbitrate their claim because the arbitration provision was
21 unconscionable and attempting to invoke an unconscionable provision is illegal, against public
22 policy and futile. Id. The court rejected this theory, holding that it did not satisfy the Lujan standard
23 because the alleged injury was hypothetical, not actual or imminent. Id. The court also rejected the
24 plaintiffs’ argument that the presence of unconscionable terms in a contract, standing alone,
25 constitutes injury in fact. Id. at 5.
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In response to defendants’ arguments, plaintiff proposes three theories for injury in fact.

1 First, plaintiff repeats the argument he made in American Express that he would like to arbitrate his
2 fraud claim but cannot because seeking to enforce an unconscionable provision is illegal, against
3 public policy, futile, and would require plaintiff to waive his legal challenges to the arbitration
4 provision. According to plaintiff, he has been injured by his inability to arbitrate his claims.
5 Second, plaintiff argues that he does not need to invoke the arbitration provision or other challenged
6 provisions to establish injury in fact. Plaintiff asserts that he has already satisfied the injury
7 requirement on the basis that he suffered a “loss in value” as a result of receiving a contract with
8 unconscionable provisions. According to plaintiff, his Agreement is akin to a “defective” or “non-
9 conforming” good because he paid for an agreement with conscionable and enforceable provisions,
10 but received one with unconscionable and unenforceable provisions. Third, plaintiff argues that the
11 violation of a state legal right—here, plaintiff’s rights under the UCL and the CLRA—establishes
12 injury in fact.

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15 Having considered the parties’ arguments, the court finds that plaintiff has failed to satisfy
16 the injury in fact requirement. Plaintiff’s first injury theory—that he would like to arbitrate his
17 claims against defendants but cannot—fails because it does not allege an injury that is “actual or
18 imminent.” See Lujan, 504 U.S. at 560. On this point, the court is persuaded by American Express,
19 which held that because such a “theory rests on hypothetical assumptions about what may or may
20 not transpire . . . it is impossible to conclude that plaintiffs have described an injury that is
21 ‘imminent’ within the meaning of Lujan.” 2007 U.S. Dist. WL 4287557, at *3. The court agrees.
22 Injury in fact is an Article III requirement, not an equitable consideration that can be put aside for
23 convenience. Although plaintiff may find it a waste of time and money to attempt to arbitrate his
24 claims, it is certainly not illegal or against public policy for him to do so, and he must do so if he
25 wishes to pursue his claims. Accordingly, the court finds no merit to plaintiff’s first injury theory.

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28 Plaintiff’s second theory—that he suffered a “loss in value” because his contract contains

1 unconscionable terms—fails on two grounds. First, contrary to his argument, plaintiff did not
2 receive a “defective” or “non-conforming” contract. The contents of the arbitration provision and
3 other challenged provisions were plainly visible to plaintiff when he signed the Agreement. Thus,
4 plaintiff received exactly what defendants promised him. Second, plaintiff’s theory wrongly
5 assumes that the mere presence of purported, but unproven, unconscionable provisions in the
6 Agreement has caused plaintiff a loss in value. By plaintiff’s logic, every party to a card-member
7 agreement with defendants—or any other credit card company, for that matter—has incurred a “loss
8 in value,” even those who have not sought and will not seek to arbitrate a claim. Needless to say, no
9 federal court has held that injury in fact exists under such circumstances. To establish injury in fact
10 in this case, plaintiff must do more than allege that the provisions are unconscionable—he must
11 show that they have caused or will cause him concrete harm. Because he has not done so, plaintiff’s
12 second injury theory fails.

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15 Plaintiff attempts to salvage his “loss in value” theory by arguing that it is supported by the
16 Ninth Circuit’s decision in Lozano v. AT&T Wireless Services, Inc., 504 F.3d 718 (9th Cir. 2007).
17 Lozano held, *inter alia*, that the plaintiff, a cell phone customer, satisfied the injury requirement
18 after he lost a certain number of “anytime” call minutes as a result of illegal billing practices by the
19 defendant, a cell phone company. Id. at 733. Because the plaintiff did not receive the full number
20 of minutes that he purchased, he did “not receive the full benefit of his contract.” Id. Here, plaintiff
21 seizes this language to argue that he has not received the “full value of his contract” because it
22 contains unconscionable provisions. But plaintiff misses the obvious point that he, unlike the
23 plaintiff in Lozano, has not lost anything. Plaintiff does not allege that defendants deprived him of
24 use of any of the agreed upon features of his credit card. Hence, Lozano does not support plaintiff’s
25 assertion that he did not receive the “full value of his contract.”
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Plaintiff’s third injury theory—that defendants injured him by violating his statutory rights

1 under the CLRA and the UCL—also fails to allege actual or imminent harm. To be sure, “state law
2 can create interests that support standing in federal courts.” Cantrell v. City of Long Beach, 241
3 F.3d 674, 684 (9th Cir. 2001). But that does not mean that the violation of a state law, standing
4 alone, supports standing. The person invoking federal jurisdiction must allege some actual or
5 imminent injury as a result of the violation. See Lujan, 504 U.S. at 560-61 (“the injury must affect
6 the plaintiff in a personal and individual way”). Because plaintiff has not alleged facts indicating
7 that he was personally harmed by defendants’ alleged statutory violations, he has not suffered injury
8 in fact.¹

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19 CONCLUSION

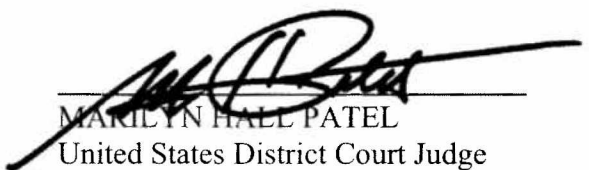
20 Plaintiff’s claim does not present a “Case” or “Controversy” because the allegedly
21 unconscionable provisions in the Agreement have not been implicated in an actual dispute. The
22 obvious architect of this ill-conceived suit is plaintiff’s attorney, who, not incidentally, also
23 represented plaintiff in his materially identical claims against American Express and Chase

1 Manhattan Bank. Although plaintiff's attorney characterizes this suit as an attempt to advance
2 consumers' legal rights, it is apparent to the court that it is instead an attempt to manufacture a
3 lawsuit for financial gain. The timing says it all—plaintiff obtains the credit card in March 2007,
4 sends a letter complaining of the Agreement he just signed on March 23, 2007, and files this lawsuit
5 on September 5, 2007. Needless to say, this suit borders on frivolous and has no place in federal
6 court.
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8 For the foregoing reasons, defendants' motion to dismiss is GRANTED.
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10 **IT IS SO ORDERED.**
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12 Dated: March 4, 2008


MARILYN HALL PATEL
United States District Court Judge
Northern District of California

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24 ENDNOTES

25 1. Plaintiff also filed a statement of recent decision in support of his opposition to defendants' motion
26 to dismiss, citing Cartwright v. Viking Industries, Inc., No.07-02159, 2008 U.S. Dist. LEXIS 10240
(E.D. Cal. February 12, 2008). Cartwright, however, does not support any of plaintiffs' theories for
27 injury in fact.
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